In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GERRITT JOHANNES VAN LEEUWEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case entered on May 29, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A, pp. 7–10, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, p. 11, *infra*) was entered on May 29, 1969. On June 26, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

358-108—69

QUESTION PRESENTED

Whether the Fourth Amendment is violated when post office officials detain packages believed to contain illegal matter for the short period of time needed to check some facts and apply for a warrant.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of illegally importing from Canada two packages containing gold coins, in violation of 18 U.S.C. 545. He was sentenced to imprisonment for three years and fined $1,500.

At about 1:30 p.m. on Thursday, March 28, 1968, respondent mailed two twelve-pound packages at the post office in Mount Vernon, Washington, which is about sixty miles from the Canadian border. One package was addressed to Van Nuys, California, and the other to Nashville, Tennessee. Each package was sent registered mail and declared to contain coins valued at $10,000.

As the respondent was leaving the post office, the clerk told Captain Belgard of the Mount Vernon police, who happened to be present, that he was suspicious of the packages. Captain Belgard noticed that respondent's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a neighboring junior college. Captain Belgard called the Canadian Police who in turn called R. J. O'Hearn, Customs Officer-in-Charge at Seattle, Washington. At about 3:00 p.m., O'Hearn telephoned the Customs office in Van Nuys and learned that the

addressee of one of the packages was under investigation by that office for trafficking in illegal coins. Due to the difference in time, O'Hearn could not then reach the customs office in Nashville, Tennessee, the destination of the other package. When he telephoned that office the following morning, he learned that the addressee of the second package was also suspected of trafficking in gold coins. O'Hearn then filed an affidavit for a search warrant with the United States Commissioner in Seattle. At 3:00 p.m., the search warrant was issued at Seattle and at 6:30 p.m. it was served at the post office at Mount Vernon.[1] When the packages were opened, they were found to contain gold coins.

Other evidence at the trial showed that the respondent crossed into the United States from Canada with the two packages in his possession without declaring them to customs officials.

The court of appeals concluded that the period between the time that the packages were mailed and the time that the warrant was executed, a period of 29 hours, was "unreasonably long" and that detention of the packages for such a period of time without judicial authorization violated the Fourth Amendment. It reasoned that Inspector O'Hearn should have applied for a search warrant once he learned that the Van Nuys addressee was under investigation for trafficking in gold coins. The court reached its conclusion despite the fact that it found that Inspector O'Hearn's deci-

[1] Mount Vernon is located approximately sixty miles north of Seattle.

sion to wait to check the destination of the Nashville package was "an understandable exercise of caution" (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

In *Chimel* v. *California*, No. 770, O.T., 1968, decided June 23, 1969, this Court recently reemphasized the need for law enforcement officers to obtain a judicial warrant before conducting a search. This case presents an important question as to what actions law enforcement officers may take to preserve the status quo during the time needed to conclude their investigation and to obtain a search warrant.

Despite the fact that the agents here secured a search warrant, the court below held that, in the absence of a warrant, the post office had no right to detain the packages until the investigation was completed and the warrant was obtained. Although the court found that the officials acted with understandable caution, it nevertheless felt compelled to hold that the detention was unreasonable under the Fourth Amendment. At least one of the judges, and perhaps the entire panel, concluded that decisions of this Court required this result, even though it was at odds with a reasonable appraisal of the action taken. Thus, the post office agents are condemned, not for acting precipitously, but for acting cautiously.

Here the seizure was made with a warrant, and the court below did not question the adequacy of the affidavit on which the warrant was obtained. The only question arises because of the actions taken to preserve the status quo while that warrant was obtained—actions which

were taken promptly and carefully in the light of all the circumstances.

This Court has never expressly formulated principles governing the rights of law enforcement officers to detain property or otherwise to preserve the status quo for a short time pending an application for a search warrant. It did, in *Terry* v. *Ohio,* 392 U.S. 1, uphold a brief detention of a person without a warrant. And in *Preston* v. *United States,* 376 U.S. 364, the Court implied that law enforcement officials could, subsequent to an arrest, detain an automobile pending an application for a search warrant. If an automobile can be detained for a limited period without the consent of the owner, it would follow that a package placed in the custody of the post office could be detained for a reasonable period while government officials decide whether they may justifiably apply for a warrant to examine its contents. In our view the court below has misconstrued *Katz* v. *United States,* 389 U.S. 347; *Davis* v. *Mississippi,* No. 645, O.T., 1968, decided April 22, 1969; and *Camara* v. *Municipal Court,* 387 U.S. 523, the cases upon which it relied, in holding that these decisions require that a search be found invalid even though it is made pursuant to a warrant obtained from a magistrate, simply because there has been a limited detention needed to check facts so that a proper warrant could be obtained.[2]

[2] The problem of detaining letters in order to record the information on the outside of envelopes, the so called "mail watch" (see, *e.g.*, *Lustiger* v. *United States,* 386 F. 2d 132, 139), is significantly different from detaining packages containing matter not protected by the First Amendment.

The question of the right to detain, or otherwise to preserve the status quo, pending application for a warrant is of great significance to law enforcement. There are many situations in which law enforcement officers find it necessary to preserve the status quo for a period of time pending further investigation and an application for a warrant. For example, suspicious circumstances may justify the brief detention of an automobile so that a check of its ownership may be made. Moreover, in light of *Chimel,* there may be circumstances where, in order to prevent a third person from destroying or concealing evidence after an arrest has been made on the premises, law enforcement officials will find it necessary to control egress from a dwelling during the period of time necessary to get a search warrant. If the government's right to detain property when placed in its custody is as restricted as the court below found here, then it would follow that the government's right to hold or control property against the will of its owner or possessor would likewise be limited. The decision below thus raises an issue of fundamental importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
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BEATRICE ROSENBERG,
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JULY 1969.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 23449

UNITED STATES OF AMERICA, APPELLEE

vs.

GERRITT JOHANNES VAN LEEUWEN, APPELLANT

(May 29, 1969)

On Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: CHAMBERS and KOELSCH, *Circuit Judges*, and *SOLOMON, *District Judge*

SOLOMON, *District Judge:*

Gerritt Johannes Van Leeuwen was convicted of illegally importing gold coins into the United States in violation of 18 U.S.C. § 545. He claims the post office violated the Fourth Amendment when it detained two first class packages without a warrant. He also claims an affidavit in support of a search warrant was insufficient. We reverse on the basis of Appellant's first claim.

On March 28, 1968, at about 1:30 P.M., Appellant mailed two twelve-pound packages at the post office in Mount Vernon, Washington. He sent both pack-

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

ages by first class mail and insured each for $10,000. Appellant told the postal clerk that the packages contained coins. As appellant was leaving the post office, the clerk told Captain Belgard of the Mount Vernon police that he was suspicious of the packages. Captain Belgard noticed that Appellant's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a neighboring junior college.

Captain Belgard called Sergeant McKenzie of the Canadian police, who, in turn, called R. J. O'Hearn, Customs Officer-in-charge at Seattle, Washington. At about 3:00 P.M. O'Hearn called the Customs office in Van Nuys, California, the destination of one of the packages. He learned that the addressee was under investigation for trafficking in illegal coins. O'Hearn could not reach the Customs office at Nashville, Tennessee, the destination of the other package, because of the time difference. When he called the next morning, he learned that the addressee of the second package was also suspected of trafficking in gold coins. O'Hearn secured a search warrant and opened the packages at 6:30 P.M. on March 29. The Mount Vernon post office detained the packages for 29 hours, between the time they were mailed and the execution of the warrant. No judicial officer authorized this detention.

First class mail is protected by the Fourth Amendment. *Ex Parte Jackson,* 96 U.S. 727 (1878). *Oliver* v. *United States,* 239 F. 2d 818 (8th Cir. 1957). In *Lustiger* v. *United States,* 386 F. 2d 132 (9th Cir. 1967), the Court said:

> "The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails * * *. Thus, first class mail *cannot be seized and retained,* nor

> opened and searched, without the authority of a search warrant." 386 F. 2d 139. (Emphasis added.)

The Fourth Amendment protects "the right of the people to be secure * * * in their papers and effects, against unreasonable searches and seizures." The information known to Captain Belgard immediately after Appellant mailed the packages would reasonably have justified a brief detention, without a warrant, while a further investigation could be made. *Terry* v. *Ohio,* 392 U.S. 1, 20–21 (1968); *cf. Warden* v. *Hayden,* 387 U.S. 294 (1967).

By 3:00 P.M., O'Hearn knew that the addressee of one of the packages was under investigation for trafficking in gold coins. This additional fact supplied probable cause to search the packages. Instead, O'Hearn decided to wait until the following day so he could call the customs office at the destination of the second package. This decision represents an understandable exercise of caution. Nevertheless, as a result of this delay, the packages were detained for 29 hours at the post office. This period was unreasonably long, and the officers should have obtained a warrant authorizing the detention. *Katz* v. *United States,* 389 U.S. 347 (1967); *Lustiger* v. *United States, supra*; *see Davis* v. *Mississippi,* * * * U.S. * * *, 37 USLW 4359 (1969); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).

In *Katz,* the Government urged the Court to "retroactively validate" the conduct of its agents who had eavesdropped on the defendant's telephone conversations. The Government argued that the agents "did no more than they might properly have done with prior judicial sanction." 389 U.S. at 356. The Court rejected this argument:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer * * *. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.'" 389 U.S. at 356–57.

In the present case, the length of time that the packages were retained by the post office made prior judicial authorization necessary.

The Government cites *United States* v. *Beckley,* 335 F. 2d 86 (6th Cir. 1964). There, the package involved was mailed from outside the country and was not in first class mail.

The Government also claims that Appellant has no standing to object to the seizure because he was not the addressee or the return addressee of the packages. There is no merit to this contention. *Jones* v. *United States,* 362 U.S. 257 (1960).

The seizure of Appellant's packages violated his rights under the Fourth Amendment and the gold coins should not have been admitted in evidence. *Weeks* v. *United States,* 232 U.S. 383 (1914).

Reversed.

CHAMBERS, *Circuit Judge,* concurring:

I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's "hot money" at the post office for 29 hours does not offend me very much. Someone in the post office holds up much of my mail over 29 hours.

I concur in the reversal only because I think precedent, which we must follow, requires us to reverse.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Ninth Circuit

No. 23449

UNITED STATES OF AMERICA, APPELLEE

vs.

GERRITT JOHANNES VAN LEEUWEN, APPELLANT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 29, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969